



PRIVILEGE PRIMER:

A REFRESHER FOR IN-HOUSE COUNSEL ON PRESERVING AND PROTECTING ATTORNEY-CLIENT PRIVILEGE

September 10, 2024
Ashley Lynam, Esq. & Jan Call, Esq.

Follow us on LinkedIn!



Presenters



Ashley Lynam

Chair

Montgomery McCracken Walker & Rhoads LLP

alynam@mmwr.com

215-772-7410



Jan Call

Head of Global Litigation

DSM-Firmenich

jan.call@dsm-firmenich.com

609-721-3872



Presentation Overview:

1. Essential Terms for Understanding ACP
2. What is ACP?
3. Special Challenges for IHC
4. State v. Federal Law
5. ACP on an International Stage
6. Takeaways

Privilege Primer: Essential Terms

- **Attorney-Client Communications**

Confidential communications between an attorney and their client, including verbal and written exchanges, made for the purpose of obtaining or providing legal advice.

- **Work Product Doctrine**

Legal documents, notes, and other materials prepared by an attorney or their staff in anticipation of litigation or in the course of their legal representation.

- **Common Interest Doctrine**

A shared legal interest between two or more parties that allows them to exchange privileged information without waiving the attorney-client privilege or work product protection.

- **Inadvertent Disclosure**

The unintentional release of privileged information, which may result in the loss of the privilege unless the disclosing party takes prompt action to rectify the situation.

- **Waiver of Privilege**

The voluntary relinquishment of the attorney-client privilege or work product protection, either explicitly or implicitly, through the disclosure of privileged information to third parties.

- What is Attorney-Client Privilege?

Oral and written communications made in confidence between or among privileged persons, including inside and outside counsel and their clients, for the purpose of **seeking, obtaining, providing legal assistance** are protected from disclosure

- Whose Privilege is it?

- Either the client or the attorney can assert privilege
- Privilege exists 'for the benefit of the client'

- What is the Purpose of the Attorney-Client Privilege?

"[T]o encourage full and frank communication between attorneys and their clients... [recognizing] that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)

- What is not Privileged?

1. Underlying facts of a matter
2. Crime-fraud exception
3. Non-confidential communications
4. Communications not involving a lawyer/agent of a lawyer
5. **Dual purpose rule



Special Challenges for In-House Counsel

Dual Roles

Service as a trusted legal advisor & business decision maker

Corporate Entity

Client is a corporation or university, not a person

Communication Content

If communication contains both legal and business advice, the privilege only applies to the legal advice

Communication Purpose

Privilege only applies when the client seeks legal advice, not only business advice

Communication Handling

The less formal and more expedient manner in which communications are prepared and sent, the greater the risk of privilege breach

Communication Scope

Privilege is limited to what is necessary to achieve the purpose of the communication



Pennsylvania

Pa.R.E. 502(b)

"client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication or other information that would disclose a confidential communication ... between the client ... and the client's attorney"

42 Pa.C.S. § 5928

"... counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same ..."

New Jersey

NJ Rev Stat § 2A:84A-20

"...communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege" to:

1. Refuse to disclose any such communication
2. Prevent his/her lawyer from disclosing it
3. Under certain circumstances, prevent any other witness from disclosing such communication" under certain circumstances

Federal

F.R.E 502(g)

attorney-client privilege is "the protection that applicable law provides for confidential attorney-client communication"

Intentional disclosure - privilege is lost

Inadvertent disclosure - privilege is not lost if holder of the privilege took reasonable steps to prevent disclosure and to rectify the error



Case Law

BouSamra v. Excela Health, 653 Pa. 365 (2019)

Facts

- Cardiologist sued Hospital for defamation and interference with contractual relations based on allegations that he performed over 100 medically unnecessary operations
- Outside counsel emailed legal advice to Hospital's IHC; IHC forwarded the email to an outside public relations firm retained to provide crisis management services
- Dispute arose as to whether the email was privileged or if the privilege was waived

Holding

- Hospital's IHC waived the ACP when it forwarded the email to the crisis-management firm.

Reasoning

- When client is a corporation, the privilege “extends to communications between its attorney and agents or employees authorized to act on the corporation's behalf.”
- Crisis-management firm was not an agent nor capable of acting on Hospital's behalf
- IHC sending the email to the firm did not facilitate or improve IHC's ability to provide legal advice to the client

Takeaways

- Educate employees on the ACP & how to identify when it applies
- Caution before sending an email to a third party that is not an employee of the corporation
- Use of non-disclosure agreements

Royzenshteyn v. Pathak, No. A-1386-22, 2024 WL 16141 (N.J. Super. Ct. App. Div. Jan. 2, 2024)

Facts

Plaintiffs - previous sole shareholders in a closely held corporation

- 2015 - sold majority of the stock in the corp. to Defendants; executed new employment contracts
- McCarter & English - law firm that represented corp. in transaction

Plaintiffs now suing Defendants claiming legal and equitable fraud in the inducement in 2015 contracts

- Claiming ACP over documents containing communications with McCarter

Holding

- Corporation was sole client of McCarter in 2015, Plaintiffs cannot assert privilege over the documents

Reasoning

- 2015 agreement only identified corporation as client
- Plaintiff's personal tax concerns related to 2015 transaction were ancillary and did not indicate personal representation
- NJ RPC 1.13: When a corporation retains an attorney, the client is "the [corporation] as distinct from its . . . employees, . . . shareholders . . ." - no exception for closely held corporations

Takeaways

- IHC must explain the identity of the client when necessary to avoid misunderstanding
- Use of express and unambiguous retainer agreements & impact on availability of privilege

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Facts

- In response to audit reflecting illegal payments, Upjohn's GC issued a questionnaire to employees requesting information
- IRS issued summons requesting production of the questionnaires
- Upjohn refused to produce the questionnaires on the basis of ACP

Holding

- Questionnaires were privileged
- Extended scope of ACP to cover non-management employees

Reasoning

- IHC can only represent the interests of the entire corporation if employees are provided the "full benefits" ACP
- Privilege must be granted to all employees capable of making a decision that would substantially affect the company's legal position

Takeaways

"Upjohn Warnings"

- ACP protects employees, but still belongs solely to the company
- Company decides whether to waive the privilege and disclose the employee-counsel communications



Attorney-Client Privilege on the International Stage

In-House Counsel in Europe

“Legal Profession Privilege”

Recognize LPP: 18

Do not recognize LPP: 13

Switzerland: adopted legislation in 2023
extending privilege to in-house counsel,
effective in 2025

"Touch-Base Test"

LPP Landscape in Europe

● LPP for In-House Counsel ● No LPP for In-House Counsel



France

- Avocats (firm attorneys) vs. Juristes D'entreprise (IHC)
- No LPP for IHC
- July 2023
 - Senate passed a bill granting privilege to written advice given by IHC
 - Constitutional Council vetoed
- February 2024
 - Senate adopted a stand-alone law that would grant IHC confidentiality for their internal communications for civil, commercial and administrative matters
- April 2024
 - National Assembly adopted a similar proposal
- French Conference of Bar Association Presidents opposes granting the privilege

China

- No ACP - ethical duty of confidentiality
- IHCs are seen as business advisors and the duty applies less to them than to external lawyers
- IHC are not considered “qualified under P.R.C. laws”
 - Not registered under local Department of Justice thus not considered “lawyers”
- Bound by confidentiality obligations under the labor and contract law

United Kingdom

- “Legal Advice Privilege” vs. “Litigation Privilege”
- Confidential communications between IHC and the company they advise are protected under the Legal Advice Privilege
 - Excludes documents that contain strategic or operational advice
- IHC must be acting in their capacity as a legal advisor not as a “man of business”
 - *Three Rivers District Council v. Governor and Company of the Bank of England*
- Litigation Privilege does not apply to expert investigations - findings not for use in proceedings that were within reasonable contemplation
 - *Kyla Shipping Co Ltd v. Freight Trading Ltd*

Tips to Re-Orient Business Partners and Approaches to ACP

- Assess Privilege Issues at the Outset
- Recognize that not all IHC enjoy ACP
- Be mindful when interacting in jurisdictions that do not recognize ACP & take steps to ensure communications remain privileged
- Retain local outside counsel in a jurisdiction that does not recognize ACP for ICH
- Clearly mark documents as "privileged and confidential"
- Avoid waving the ACP through disclosure of information and document contents
- Educate the client on how to protect the privilege
- Limit access to privileged records or investigation materials in jurisdictions where ACP does not exist or is limited
- Explain to employees that you represent the business/university and not them in their individual capacity

A reminder about the benefits of ACC membership...



- **Local Chapter** - Your local chapter is a great place to earn CLE/CPDs, network, and volunteer (and have fun!) with people who do what you do, where you do it.
- **ACC Communities** - Easily connect and exchange information that is practice area or practice setting specific with other in-house counsel facing the same challenges as you. Join unlimited networks for free as a member.
- **Member Directory** - Find other members easily and securely. Search your peers by name, specialty, chapter, country, or network. Connections that save you time, exclusively for members.
- **Free CLE** - Your membership automatically unlocks unlimited FREE CLE/CPD credit on eligible LIVE online courses with ACC Global and all ACCGP programs are free to members.
- **Exceptional Educational and Social Events** – Including the ACC Annual Meeting and local chapter programs and events, such as our Diversity Summit, Women's Summit, In-House Counsel Conference, Softball Family Fun Night, networking events, and more!
- **Show Your Expertise and Get Involved** – Volunteer on one of our practice area networks or become an in-house panelist for chapter programming.

For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Denise Downing, at ddowning@accglobal.com.